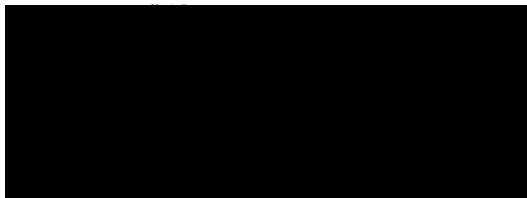




U.S. Citizenship
and Immigration
Services

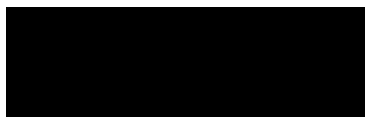
B-6



FILE: EAC-02-176-50542 Office: VERMONT SERVICE CENTER

Date: JUL 8 2004

IN RE: Petitioner:
Beneficiary:




PETITION: Immigrant Petition for Alien Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

N/A

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

RECEIVED
JUL 10 2004
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
VERMONT SERVICE CENTER
100 N. MAIN ST. SUITE 200
ST. ALBANS, VT 05478

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

At the outset, the AAO notes that the petitioner signed a Form G28, Notice of Entry of Attorney or Representative, for its purported representative, an individual who stated that he is not a lawyer affiliated with a law firm. A review of the most recent updated Accredited Representative Roster does not contain the petitioner's purported representative's name. Thus a copy of this decision will only be furnished to the petitioner and not its purported representative.

The petitioner is a full service gas station. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the petitioner because he determined the petitioner failed to establish its ability to pay the proffered wage.

On appeal, the petitioner asserts that he has the ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Regulations at 8 C.F.R. § 204.5(g)(2) state in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is April 26, 2001. The beneficiary's salary as stated on the labor certification is \$19.11 per hour or \$39,749 per year.

With the initial petition, the petitioner submitted a copy of the first page of its 2000 Form 1120 U.S. Corporation Income Tax Return. The tax return for 2000 reflected gross receipts of \$4,483,485; gross profit of \$598,339; compensation of officers of \$68,460; salaries and wages paid of \$253,203; and taxable income before net operating loss deduction and special deductions of \$26,572. It must be noted that the tax documents for the year 2000 reflect a period of time prior to the priority date and are therefore, of limited probative value.

With the initial petition, counsel submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated August 25, 2002, the director required additional evidence to

establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified the petitioner's federal income tax return and audited financial reports for the years 2000 and 2001, as well as Wage and Tax Statements (Forms W-2), or Form 1099, as evidence of wage payments to the beneficiary, if any, for 2000 and 2001.

Among other evidence, the petitioner submitted its 2001 Form 1120 U.S. Corporation Income Tax Return in response to the RFE. The tax return for 2001 reflected gross receipts of \$4,818,537; gross profit of \$644,483; compensation of officers of \$38,160; salaries and wages paid of \$303,530; and a taxable income before net operating loss deduction and special deductions of \$52,659. In addition, the petitioner submitted the beneficiary's Form W-2 Wage and Tax Statement for the year 2001 indicating that the beneficiary was paid \$20,580 during 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage by considering the petitioner's net income on its tax returns for 1999, 2000, and 2001 and denied the petition.

On appeal, the petitioner's purported representative asserts that "{t}he Net Operating Loss deduction is a tax break that allows company's [sic] to roll over past years losses on order to pay less tax. NOL is not the physical loss of money or capital." The representative further states that during 2001 the petitioner had a net income of \$52,659, which is more than sufficient to pay the proffered wage. The purported representative further states that the petitioner's 2001 assets are greater than its liabilities reflecting a net operating capital of \$92,241.

The assertions made on behalf of the petitioner are persuasive. The director mistakenly analyzed the petitioner's taxable income before operating loss deduction and special deductions. Additionally, since the priority date is April 2001, the petitioner need only establish its ability to pay for 2001. The petitioner's Form 1120 for calendar year shows a taxable income of \$52,649. From this amount the petitioner could pay the proffered wage of \$39,749. Further, as the beneficiary has already been paid \$20,580 during 2001, the additionally required funds to satisfy the payment of the proffered wage are only \$19,169 per year, which could be adequately covered by the petitioner's taxable income.

Accordingly, after a review of the federal tax returns it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.